86-739

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAURICE DAVID KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether the use of a conspiracy conviction under Title 21 U.S.C. Section 846 as one of the three offenses necessary to establish a series of offenses in the same case under Title 21 U.S.C. Section 848, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution.

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Petitioner Maurice David King petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra,* 1b-19b), has not yet been reported. The panel's opinion (App., *infra,* 1a-30a) is reported *sub nom. United States v. Ricks, et al.,* 776 F.2d 455 (4th Cir. 1985).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides in pertinent part:

> No person shall . . . be subject for the same offense to be put twice in jeopardy of life or limb. . .

Title 21, Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [Control and Enforcement] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21, U.S.C. Section 848 provides in pertinent part:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position

of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT

1. Petitioner and twelve others were indicated by a Federal Grand Jury in a multi-count indictment. Included in those charges against petitioner King was one count of conducting a criminal enterprise under Title 21 U.S.C. Section 848.

2. Petitioner's (and seven co-defendants') trial by jury in the United States District Court for the District of Maryland commenced on December 6, 1982 and continued through January 5, 1983. The jury convicted petitioner King, *inter alia,* of two counts of conspiracy to posssess and distribute narcotics (21 U.S.C. Section 846), two counts of distribution of narcotics (21 U.S.C. Section 841) and one count of conducting a criminal enterprise (21 U.S.C. Section 848).

3. On appeal to the Fourth Circuit, a panel reversed the eight appellants' convictions because of errors in the jury selection process.

With respect to the Section 846 contention, the panel held that appellant King had not preserved the issue. It noted, however, that language in *United States v. Lurz,* 666 F.2d 69 (4th Cir. 1981), supported appellant's argument but that this Court's decision in *Garrett v. United States,* ____ U.S. ____, 105 S.Ct. 2407 (1985), overruled *sub* silentio both *Jeffers v. United States,* 432 U.S. 137 (1976), and *Lurz, supra.*

5. The *en banc* Court of Appeals held that King had preserved the issue and proceeded, in effect to overule *Lurz.*

REASONS FOR GRANTING THE PETITION

1. Interpretation of Title 21 U.S.C., Section 846 raises an important and recurring issue in the administration of the federal criminal law which has divided the Circuit Courts of Appeal. Under that section a continuing criminal enterprise consists of five elements:

> (1) A felony violation of the federal narcotic laws;
> (2) As a part of a continuing series of violations;
> (3) In concert with five or more persons;
> (4) For whom the defendant is the organizer or supervisor; and
> (5) From which he derives substantial income or resources.

United States v. Lurz, 666 F.2d 69 (4th Cir. 1981). The second element – the continuing series of violations – must be established by proof of at least three violations of the provisions found in 21 U.S.C. Sections 801-966. *Garrett v. United States,* ____ U.S. ____, 105 S.Ct. 2407 (1985); *United States v. Ricks,* 776 F.2d 455, 463 (4th Cir. 1985).

To prove the alleged series of violations by appellant King, the government relied upon two convictions under 21 U.S.C, Section 841 and upon a conviction under 21 U.S.C. Section 846 – a conviction for conspiring to distribute narcotics. Under the circumstances of this case, the Section 846 conspiracy was factually a lesser included offense of the CCE charge. Consequently, the Section 846 conviction could not constitute a predicate offense of the asserted criminal enterprise because Congress did not intend that the lesser included offense or conspiracy be itself a part of the proof for the greater offense of CCE.

The issue before this Court, therefore, is whether, consistent with both Congressional intent and the Double Jeopardy clause, a conspiracy proven under Section 846 can serve simultaneously as three separate elements of CCE: proof of a felony violation of the federal narcotics laws (Element 1); one of the three predicate offenses (Element 2) and acting in concert with five or more persons (Element 3). For that is precisely what happened in this case. Appellant was charged in a Section 846 conspiracy charge that factually overlapped the CCE charge. The jury was instructed that if it convicted appellant of the Section 846 charge, it could use that conviction when it considered the CCE charge both as proof of a felony violation of the federal narcotics laws (Element 1) *and* as one of the three predicate offense (Element 2). And, of course, the same evidence used by the jury to convict appellant of Section 846 conspiracy charge was relied upon by the government in satisfying the third element of CCE, that appellant acted "in concert with five or more persons."

2. The starting point to answering this question is determining Congress' intent in enacting the two statutes. *See, e.g., Whalen v. United States,* 445 U.S. 684 (1979). It is clear, first of all, that Congress – in the view of this Court – intended that Section 846 be a lesser included offense of CCE. In *Jefffers v. United States,* 432 U.S. 1378 (1976), the Court analyzed both the legislative intent behind, and the statutory language of CCE. The Court focused on the term "concerted activity," and whether Congress, by using that term intended to require a conspiracy or agreement among the persons involved in the continuing criminal enterprise. If that was the case, a conspiracy charged under Section 846 would be a lesser included offense of CCE. Examining both the statutory language and the legislative history of CCE, the Court found that Section 848(b)(2)(A)

> restricts the definition of the crime to a continuing series of violations undertaken by the accused "in concert with five or more persons." Clearly, then, a conviction would be impossible unless concerted activity were present. The express "in concert" language in the statutory definition quite plausibly may be read to provide the necessary element of "agreement" . . . It would be unreasonable to assume that Congress did not mean anything at all when it inserted these critical words in Section 848. In the absence of any indication from the legislative history or elsewhere to the contrary, the far more likely explanation is that Congress intended the word "concert" to have this common meaning of agreement in a design or plan.

Id., at 148-49. The Court also found support of its interpretation of "in concert" in the Section-by-Section analysis of the Senate version of the bill and in the Congressional debates on the bill.

This Court in *Jeffers* held that Congress did not intend to allow for cumulative punishment in situations where a defendant was convicted of both Setion 846 and CCE violations. The "critical inquiry" the Court engaged in again was determining Congressional intent – whether Congress intended to punish each statutory violation separately. Recognizing the possibility that the two statutory offense – Section 846 and CCE – are "the same offense for double jeopardy purposes" the Court "examin[ed] the problem closely, in order to avoid constitutional multiple punishment difficulties." *Id.*, at 155. It found that Congress did not intend to provide for multiple punishment for Section 846 and CCE.

Jeffers, we submit, is illuminative of the relevant Congressional intent behind these two statutes and determina-

tive of the issue here. In *Jeffers,* on the basis of its assessment of Congressional intent, the Court assumed, without deciding, that

> Section 848 does require proof of an agreement among the persons involved in the continuing criminal enterprise. So construed Section 846 is a lesser included offense of Section 848 because Section 848 requires proof of every fact necessary to show a violation under Section 846 as well as proof of several additional elements.

Id., at 151 (Opinion of Blackmun, J.). *See also, United States v. Jefferson,* 714 F.2d 689 (7th Cir. 198?) ("[W]e conclude that Section 846 was intended by Congress to be a lesser included offense of Section 848.") The Congressional intent the Court relied upon in *Jeffers* also indicates that Congress did not intend that a Section 846 conspiracy be used as one of the three violations to establish the requisite series under Sectdion 848.

The importance of whether the asserted predicate offense is a lesser included offense of a CCE violation was recognized and succinctly addressed by the Fourth Circuit in *United States v. Lurz, supra.* In *Lurz,* the Court concluded that a CCE charge cannot be based on the same conspiracy charged in an underlying (lesser included) conspiracy charged under Section 846:

> One may not first prove a conspiracy to distribute to establish a Section 846 violation and then move on to convict under Section 848 as well, by using the very same conspiracy to distribute for the felony violation of the federal narcotic scheme (item one in the five point scheme).

3. There is a compelling reason for concluding that Congress could not have intended the lesser included of-

fense of conspiracy (Section 846) to be the first element of a CCE allegation and also one of the three necessary predicate offense of CCE. Abundant evidence establishes that Congress intended CCE to be a vehicle to get the major traffickers of drugs, the ones who were so successful that their concerted actions had led to at least three substantive violations of the narcotics laws. *See, e.g.*, 116 Cong. Rec. at 33630 (comments of Rep. Poff); *see also, Garrett, supra,* ____ U.S. at ____, 105 S.Ct. at 2415. One element that Congress placed in CCE, therefore, is a requirement of "concerted behavior." As the *Jeffers* Court held, that element "necessarily includes" proof of a conspiracy. The second major requirement of CCE is the commission of "a series," construed by the judiciary as at least three, narcotics violations. *See e.g., Garrett v. United States, supra.*

To be eligible for the very stringent penalties of CCE, in other words, a narcotics violator must be sufficiently big – the "top brass" in the drug rings, not the lieutenant and foot soldiers" – (*Garrett, supra,* ____ U.S. at ____, 105 S.Ct. at 2413) that he not only conspires with five or more people, but, as a result, three or more substantive narcotics violations result. If, however, proof of a Section 846 conviction could *itself* be one of the three predicate offenses, then it would effectively rewrite the statute to require only two predicate offenses, not three. *Cf.* 116 Cong. Rec. 33631 (comments of Rep. Eckhardt) ("Under [21 U.S.C. Section 848] if you are going to prove a man guilty, you have to come in and prove every element of the continuing criminal offense.") Congress, in other words, being primarily a "body of lawyers," *Garrett v. United States, supra,* 105 S.Ct. at 2419, quoting from *Albernaz v. United States,* 450 U.S. 333, 344 (1981), must be presumed to have realized that *every* CCE case would entail proof of a Section 846 conspiracy. It is only logical to presume that

Congress, when it added the requirement of three predicate offenses, did not intend that the lesser included offense of conspiracy also be considered one of the predicate offenses.

4. The panel opinion recognized the force of appellant's arguments, and the support it had from *Jeffers* but suggested that appellant's argument was threatened by this Court's recent decision in *Garrett v. United States, supra. Garrett,* however, properly read, is entirely consistent with *Jeffers* and *Lurz.* The panel suggested that *Garrett* overruled *Jeffers* (and *Lurz*) *sub silentio:*

> The *Garrett* Court did not focus on the identity of the necessary predicate offenses, but *Garrett* was convicted of only two substantive and two conspiracy counts, so affirmance indicates that conspiracy violations may constitute a necessary part of the required series.

United States v. Ricks, supra, 776 F.2d at 464 n. 16 (citations omitted). The *en banc* Court apparently agreed with the panel's reasoning and in effect overruled *Lurz.*

The panel, however, misread the *Garrett* opinion, for in fact *Garrett's CCE conviction was not predicated upon any conspiracy convictions.*

To begin with, Justice Rehnquist is careful throughout his opinion for the Court in *Garrett* to emphasize that the only issue in *Garrett* was the relationship of "substantive" offenses to the CCE conviction. *Id.,* 105 S.Ct. at 2410, 2420. And this care was necessary because in the district court the jury was presented only with substantive offenses as alleged predicates for the CCE charge:

> As to the predicate violations making up the "series," the court instructed the jury that in addition to the offenses charged as *substantive*

> counts in the Florida indictment, the felony offenses of possession of marijuana with intent to distribute it, distribution of marijuana, and importation of marijuana[ ] would qualify as predicate offenses.[1]

Id., 105 S.Ct. at 2410 (emphasis supplied).

The actual structure of the charge in the district court in *Garrett* can be fully understood only by reading Justice Stevens dissenting opinion. For there it is revealed that the CCE count in *Garrett* relied for predicate offenses only upon three substantive violations which were not charged elsewhere in the indictment:

> Notably, although each of the three principal transactions would obviously have supported a substantive charge of importation in violation of Section 21 U.S.C. Section 812 and Section 952, no such charge was made against petitioner.
>
> Instead, Count IX charged that he had engaged in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. Section 848 "from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment."
>
> * * *
>
> [The indictment] did not separately charge any of the three earlier importations as substantive violations. Evidence of those felonies were offered to establish the greater CCE offense rather than separate, lesser offenses.

Id., 105 S.Ct. at 2423, 2425 (footnote omitted).

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[1]All of these of course are substantive, non-conspiracy offenses.

5. Thus, the rule that the Fourth Circuit recognized in *Lurz, supra,* – that "[o]ne may not first prove a conspiracy to establish a Section 846 violation and then move on to convict under Section 848 as well, by using the same conspiracy," *United States v. Lurz, supra,* 666 F.2d at 76 – is not in any way affected by, and remains completely valid after, the decision in *Garrett.*

Indeed, the reasoning in *Garrett* underscores the accuracy of the *Lurz* analysis. Garrett's CCE conviction was predicated, *inter alia,* upon a prior importation of narcotics. *United States v. Garrett, supra,* 105 S.Ct. at 22410, 2415-16, 4224, 2425. Garrett contended that the importation conviction could not serve as the predicate offense for the CCE. The Court disagreed and distinguished *Brown v. Ohio,* 432 U.S. 161 (1977). In *Brown,* the Court pointed out, the defendant "had engaged in a *single course of conduct.* . . . Every moment of his conduct was as relevant to the joyriding charge as to the auto theft charge." *United States v. Garrett, supra,* 105 S.Ct. at 2416 (emphasis supplied). In *Garrett,* on the other hand, the continuing criminal enterprise – which covered five years – was wholly separate from the importation conviction – which pertained to one day. Consequently, conviction both of importation and CCE did not subject Garrett to double jeopardy.

In this case, however – unlike *Lurz* and *Garrett* and like *Jeffers* – the Section 846 offense was the same offense alleged in the CCE count. Because these two offenses involve a "single course of conduct," *United States v. Garrett, supra,* 106 S.Ct. at 2416, the Section 846 offense was only a lesser included offense of the CCE charge and therefore could not constitute a predicate offense of the alleged enterprise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage pre-paid, to James Barr Morehead, Assistant United States Attorney for the Districtof Maryland, 101 Lombard Street, Baltimore, Maryland 21201, and to counsel for Appellants, and to the Office of the Solicitor General, United States Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C. 20530, on this _____ day of October, 1986.

_____

W. Gary Kohlman

APPENDIX A

UNITED STATES of America, Appellee,

v.

Thomas Calvin RICKS, *et al.*,

Nos. 83-5060(L), 83-5061 through 83-5066 and 83-5081.

United States Court of Appeals,
Fourth Circuit.

Argued May 6, 1985.

Decided Oct. 10, 1985.

Defendants were convicted in the United States District Court for the District of Columbia, Maryland, Alexander Harvey, II, J., of engaging in conspiracy to possess and distribute heroin and cocaine, and two defendants were convicted of other related offenses, of conducting continual criminal enterpise, and a violation of Travel Act, and they appealed. The Court of Appeals, Harrison L. Winter, Chief Judge, held that: (1) right of defendants to peremptory strikes of prospective jurors was impaired necessitating reversal; (2) evidence was legally sufficient to convict defendants; and (3) defendants were not entitled to severance.

Reversed and remanded.

Wilkinson, Circuit Judge, filed a dissenting opinion.

Ransom J. Davis, Stuart R. Blatt, Baltimore, Md., W. Gary Kohlman, Washington, D.C., Charles Lee Nutt, William H. Murphy, Baltimore, Md. (H. Russell Smouse, Harry J. Matz, Melnicove, Kaufman, Weiner & Smouse

P.A., Baltimore, Md.; Kenneth Michael Robinson, Washington, D.C., Edwrd Smith, Jr., Cummings & Smith, P.A., Jack Rubin, Baltimore, Md., on brief), for appellants.

J. Frederick Motz, U.S. Atty., Baltimore, Md., for appellee.

Before WINTER, Chief Judge, WILKINSON, Circuit Judge, and TURK, Chief District Judge, United States District Court for the Western District of Virginia, sitting by designation.

HARRISON L. WINTER, Chief Judge:

Eight defendants convicted by a jury of a variety of narcotic offenses appeal assigning diverse reasons why the judgments of their convictions should be set aside. We perceive as a basic error in their trials the effective denial of their statutory right to peremptory challenges in the selection of the jury. This error is sufficient to require reversals and a new trial. We decide the case solely on this ground, although we comment on defendants' other contentions which relate to issues that are bound to arise on retrial.

I.

Defendants Ricks, Carter, Moffat, Rogers, Lindsey, Frisby, Roberts and King were all convicted of engaging in a conspiracy to possess and distribute heroin and cocaine in violation of 21 U.S.C. § 846. King and Ricks, two of the leaders of the conspriacy, were also convicted of other related substantive offenses, of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, and of

violation of the Travel Act, 18 U.S.C. § 1952.[1] The case, which took five weeks to try, arose from the operation of a major drug distribution organization in Baltimore City. Defendants King, Ricks and Meredith were the heads of the organization; defendant Carter the financial advisor; defendants Moffatt, Lindsey and Hurt were lieutenants of certain inner city street corners where drugs were sold; defendant Frisby was a sublieutenant and distributor, defendant Rogers was a courier of drugs and money; and defendant Roberts was the girlfriend of Ricks who allowed her apartment to be used for illegal purposes and who otherwise assisted in the operation.

Our statement of facts is limited by the basis on which we decide the case and further limited to the recurrent issues that we think warrant comment.

II.

When the trial of the nine defendants began, they, of course, together with the government, had a statutory right to peremptory challenges in the jury selection process. Since the offenses charged were punishable by imprisonment for more than one year, Fed.R.Crim.P. 24(b) provided the government was entitled to six peremptory challenges and the defendants jointly to no less than ten peremptory challenges. The rule provides that where "there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit

[1]Originally thirteen defendants, including the eight appealing defendants, were indicted jointly. Three defendants (Hines, Williams and West) pled guilty; one (Meredith) is a fugitive; and defendant Hurt dismissed his appeal after his sentence was modified. Defendant Carter was acquitted of a substantive charge at trial. Defendants Moffat, Lindsey and Frisby were convicted of substantive offenses in addition to the § 846 conspiracy.

them to be exercised separately or jointly." The rule also provides that defendants and the government are entitled to additional peremptory strikes if alternate jurors are used – one challenge for up to two alternate jurors and two challenges for up to four alternate jurors. Fed.R.Crim.P. 24(c).

The district court granted defendants jointly twelve peremptory challenges for the main jury,[2] with six for the government. The district court concluded to use four alternate jurors, and it granted defendants jointly and the government each two peremptory challenges exercisable against the alternates.[3]

Seventy-five veniremen reported for jury duty on the day that defendants' trial began. The seventy-five were ultimately divided into two groups – a group of sixty-six from which active jurors in this case were to be chosen and a group of nine from which alternate jurors were to be chosen. The record suggests that such a large number was brought in because one or more other district judges would select juries from the pool once the jury in defendants' case had been selected.[4]

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[2]Defendants during the trial and in their brief before us exhibit confusion as to how many strikes from the active jury they were given. In several instances, they claim that they were given thirteen strikes but only exercised twelve. The transcript reflects that they were given only twelve. That is the figure used by the government in its brief.

The difference between twelve and thirteen is not significant in this case because the fact is that defendants exercised *none* of their strikes in the portion of the list of veniremen from which the jury was selected.

[3]The district court explained the mechanics of exercising the peremptory challenges of alternative jurors by stating "we'll take the last eight names on the list for our alternates and the defendants jointly will take two strikes against that and the government will take two, and that will leave four alternates."

[4]If defendants' jury were the only jury to be selected, fewer veniremen would have been required, *viz*

Before voir dire began, an Assistant United States Attorney inquired of the court about the portion of the list that the court contemplated using in drawing a jry. The inquiry was apparently generated by the unusually large list of veniremen. The actual inquiry and the court's response follow:

MR. ULWICK: Your Honor, may I assume that we'll be — or the Court will be picking from the top of the list?

THE COURT: Well, of course, I can't tell at this point, as far as strikes and so forth, but ordinarily I start from the top, not any rigid number, counting from the top, so I think it would be reasonably fair to say, if you want to ex-

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[4] *(continued)*

12 - main jury
4 - alternate jurors
12 - defendants' peremptory challenges
6 - government's peremptory challenges
4 - total peremptory challenges to alternate jurors

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Some additional veniremen would have been required to allow for challenges for cause, but after the ten such challenges in this case, there were still twenty-seven extra veniremen. Thus the actual venire was over 50% larger than necessary. Our decision in this case does not rest on the total size of the venire, but on the absence of effective notice of how actual jurors would be chosen. We note, however, that an excessively large venire could have the same effect that we condemn in this case, even if the procedure were clearly explained. The usual practice with a struck jury system, which we encourage, is for the list to contain only the approximate number of necessary potential jurors. *See, e.g., United States v. Blouin,* 666 F.2d 796,796-97 (2 Cir.1981); *United States v. Morris,* 623 F.2d 145, 151-52 (10 Cir.), *cert. denied,* 449 U.S. 1065, 101 S.Ct. 793, 66 L.Ed.2d 609 (1980). A much larger pool may be necessary to begin with, but after enough veniremen have passed voir dire without successful challenge for cause, there is no reason why the list may not be pared down to the necessary size, which in this case would have been thirty-eight.

ercise your strikes mostly at the top, and if you're satisfied with the top, don't strike there.[5]

In the course of voir dire, nine veniremen on the active list and one venireman on the alternate list were excused for cause, leaving fifty-seven on the list from which active jurors would be selected and eight to the alternate list. Copies of the list of fifty-seven and eight, respectively, were furnished counsel so that they could mark their peremptory strikes.

Defendants exercised their peremptory challenges all within the first twenty-seven veniremen who had not been excused for cause. The government exercised three of its peremptory challenges within the first twenty-nine veniremen who had not been excused for cause; one within the next thirteen from which the jury was chosen; and two within the remaining jurors who were not used. The district court, having been furnished a list of the entire venire with absences, excuses for cause, and peremptory strikes shown thereon, selected as foreman the fifteenth on the list of veniremen present who had neither been stricken nor excused for cause. The foreman appeared on the list below defendants' exercise of their strikes, and the remaining regular jurors were drawn form the list below the placement of the foreman. Thus, of the fifty-seven eligible veniremen, the jury actually picked came from numbers thirty through forty-two.

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[5]The punctuation of a transcript is ordinarly a matter left to the discretion and usage of the court reporter. It occurs to us that the thought that the district court would select jurors from the top of the list would be more positively conveyed by the written record were an additional comma inserted in the latter part of the court's statement:

> so I think it would be reasonably fair to say, if you want, to exercise your strikes mostly at the top, and if you're satisfied with the top, don't strike there.

As soon as the jury was seated and before it was sworn, defendants realized that they hd concentrated the use of their peremptory strikes in an area of the list ahead of the portion from which the active jurors were chosen. They immediately objected, asserting "[w]e relied on the Court's statement that it was going to start from the top of the list. We feel as though we have been led astray." The response of the court was that "I didn't say I was going to strike starting from the top, if that's the question. I said not necessarily."

There ensued an extended dialgoue between the court and counsel – counsel for defendants steadfastly maintaining that they had concentrated their strikes in the portion of the list from which they thought the jury would be chosen based upon their understanding that the jury would be selected from the top.[6] Counsel identified at least two jurors seated in the box as ones they would have stricken had they thought that these veniremen would have been eligible to be chosen.[7] The court required the reporter to read back the court's original statement about how the jury would be drawn, and then the court explained its comments as follows:

> So what I said was, exercise most of them from the top, but it wasn't any rigid formula. If it had been a rigid formula, I would have given you 30 and we'd put them in the box and we'd say strike each particular one here and we've ended up, I

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[6]As counsel succinctly sated "[r]ather than strike the worst 12 as we saw them, we struck the worst 12 in the order from the first number."

[7]One of the two was the foreman selected by the court. Counsel said: "We decided not to strike him because we felt that coming [counting?] from the first, from the top of the list, he would not be possibly called, even if the Government took six strikes and we took twelve, we wouldn't get to this gentlemen that is now the foreman."

> think, with 64 on the list, and there's no telling where the strikes would be.

The government, in this colloquy, pointed out that it had understood the court correctly and it had spread its strikes throughout the entire list, even though it used half of them at the top. Counsel for defendants rejoined that it was bound to be something more than coincidence that nine defense attorneys understood that they should limit their strikes to the portion of the list counting form the top from which it was mathematically like that the active jurors were to be chosen. The district court formally overruled the objection to the array, delivering the short oral opinion set forth below.[8] The veniremen seated in the box and the alternates were sworn as jurors, and the veniremen remaining in the courtroom were returned to the jury assembly room.

III.

Much of the argument before us is centered on the assertion and counter-assertion that the district court did or did

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[8]Well, the objection will be overruled as we'll swear the jury, and you have an exception, of course, to that ruling.

> It seems to me the Government followed my instructions. If counsel misunderstood them, I think that is unfortunate. I don't think that you can say the strikes were not effective because it could have been that I would have picked one of these people that you struck as the foreman. I don't know anything about any of these people. I don't think counsel does either, but at this point, to say, "We don't like the composition of the jury and therefore we ought to pick another jury because we think those people are going to be one way or the other," I don't think is the proper way to do it and I think that the Government properly followed my instructions. Defense counsel didn't. So your exceptions will be noted and we're going to swear the jury.

not positively tell counsel that it would select active jurors from the top of the list. We do not find it necessary to resolve this factual question. Certainly we do not think that the district court purposely misled defendants' counsel; defendants' counsel does not even suggest this argument. Similarly, we have no basis in the record to question the bona fides of defendants' counsel. After examining the language used, we do not think that, based upon what the district court said, it was unreasonable for defendants' counsel to interpret the court's remarks to mean that the jury would be selected largely or substantially from the top of the list. Further, we think that it was not unreasonable for defense counsel to have enough certainty in their interpretation of the court's remarks to negate any duty on their part to make a further inquiry or to request clarification.,

The practical effect of defendants' counsels' not unreasonable belief that the jury would be chosen largely or substantially from the top of the list was to frustrate the exercise of their peremptory strikes. In effect, their strikes were worthless because they were all exercised with respect to veniremen who were not considered for selection as jurors.

[1,2] The right to peremptory strikes is not a constitutional one. It was formerly a right created by statute alone, and it is presently a right created by rule of court with legislative sanction. But it is a right of such significance that denial or substantial impairment of the right constitutes per se reversible error. As authority for the latter statement, we need look only to *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and the authorities on which it relied. *Swain* was a case in which a black defendant convicted by an all-white jury sought a reversal of his conviction on the ground that he had been

denied equal protection of the laws by racially discriminatory jury selection procedures, including discrimination in the use of the peremptory strike system. The accused did not prevail in his arguments, but in the opinion of the Court dealing with the use and function of peremptory strikes, we find stated the principles which govern the decision in our case. It is necessary that we quote at some length:

> In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous sociey. The voir dire in American trials tend to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. *The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.* See *Lewis v. United States,* 146 U.S. 370, 376, 36 L.Ed. 1011, 1014, 13 S.Ct. 136 [138]. Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges," *Stilson v. United States,* 250 U.S. 583, 586, 63 L.Ed. 1154, 1156, 40 S.Ct. 28 [30], nonetheless *the challenge is "one of the most important of the rights secured to the accused," Pointer v. United States,* 151 U.S. 396, 408, 38 L.Ed. 208, 214, 14 S.Ct. 410 [414]. *The denial or impairment of the right is reversible error wihtout a showing of prejudice, Lewis v. United States,* 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136; *Harrison v. United States,* 163 U.S. 140, 41 L.Ed. 104, 16 S.Ct 961;

> cf. *Gulf, Colorado & Santa Fe R. Co. v. Shane,* 157 U.S. 348, 39 L.Ed. 727, 15 S.Ct. 641. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis v. United States,* 146 U.S. 370, 378, 36 L.Ed. 1011, 1014, 13 S.Ct. 136 [139].

380 U.S. at 218-19, 85 S.Ct. at 835 (footnotes omitted; emphasis added).

[3] Since we read *Swain* and *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894), to say that the denial or impairment of the right to peremptory strikes is reversible error per se, and since we concluded that defendants' right in this case was effectively, albeit inadvertently, denied, we must reverse the convictions and grant a new trial.[9]

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[9]While we find no precedent precisely in point, we think that our holding is in accord with general propositions reflected in the weight of authority. *See United States v. Turner,* 558 F.2d 535 (9 Cir.1977) ("[a]mbiguous exchanges that led to misunderstandings between the court and counsel about the district court's own ground rules" became automatic reversible error when defendant was not given adequate notice of the system to be used and his use of peremptories was restricted); *United States v. Sams,* 470 F.2d 751 (5 Cir.1972) (defense counsel was "predictably misled" by a question from the clerk and surprised when accurately informed of the system being used; serious limit on full, unrestricted exercise of peremptories constituted plain and reversible error); *United States v. Rucker,* 557 F.2d 1046 (4 Cir.1977) (defendant must have meaningful opportunity to exercise peremptory challenges; district court's erroneous refusal to excuse a juror for cause constitutes reversible error because the number of peremptory challenges available to the defense was effectively reduced when defendant was forced to use a peremptory to strike that juror); *United States v. Allsup,* 566 F.2d 68, 71 (9 Cir.1977) (same as *Rucker); United States v. Nell,* 526 F.2d 1223, 1229 (5 Cir.1976) ("[A]s a general rule it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause,

IV.

Defendants Ricks and King were charged and convicted jointly of interstate travel in aid of racketeering (18 U.S.C. § 1952), conspiracy to possess and distribute narcotics (21 U.S.C. § 846), and conducting a continuing criminal enterprise (21 U.S.C. § 848). King was also charged and convicted of two substantive distribution offenses in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2, and Ricks was indicted and convicted of three separate distribution offenses in violation of those same statutes. They[10] challenge their continuing criminal enterprise (CCE) convictions

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[9]*(continued)*
for this has the effect of abridging the right to exercise peremptory challenges."); *Spencer v. State,* 20 Md.App. 201, 314 A.2d 727 (1974) (denial of due process for clerk, after defense had exercised all peremptories, suddenly to skip down the list of prospective jurors rather than to continue to proceed in order from the top); *cf. Hines v. Enomoto,* 658 F.2d667 (9 Cir.1981) (misleading statement by clerk that effectively denied half of peremptories allowed by state law could form the basis for federal habeas relief); *Carr v. Watts,* 597 F.2d 830 (2 Cir.1979)(in a civil case, forced waiver of one peremptory was a direct impairment of a statutory right and thus automatic reversible error).

While we decide this case on the basis of what counsel may reasonably (measured by an objective, and not a subjective, standard) have understood the district court to mean, we are not unmindful that some of these authorities, particularly *United States v. Turner, supra,* hold or strongly suggest that, absent a local rule of court or established local practice about how a jury will be selected and how peremptory strikes should be exercised with respect to a large venire, there is a duty on the part of the court to give clear, unambiguous instructions to counsel about the procedure to be followed and that a failure on the part of the court in this respect is plain error. This line of authority would be fully applicable here because there is little doubt that there was ambiguity in what the court said. Under this line of authority, an objection by counsel is unnecessary to preserve the issue for appeal.

[10]The argument is advanced soley by Ricks, but since the issue is likely to recur on retrial, we address it as it applies to both Ricks and King.

under 21 U.S.C. § 848 because they believe the jury was erroneously instructed that the lesser included § 846 conspiracy could serve as a predicate offense for the CCE charge.

Some of defendants' cumulative convictions and sentences were clearly improper at the time they were imposed, because our cases had established, in harmony with numerous cases from other circuits, that §§ 846 and 841 specified lesser included offenses under § 848, and that separate convictions and punishments could not be imposed for the greater and lesser offenses. *See United States v. Leifried,* 730 F.2d 388 (4 Cir.1984); *United States v. Raimondo,* 721 F.2d 476 (4 Cir.1983), *cert. denied,* ____ U.S. ____, 105 S.Ct. 133, 83 L.Ed.2d 74 (1984); *United States v. Lurz,* 666 F.2d 69, 75 (4 Cir.1981), *cert. denied,* 459 U.S. 843, 103 S.Ct. 95; 74 L.Ed.2d 87 (1982); *United States v. Webster,* 639 F.2d 174, 182 (4 Cir.981). These conclusions may remain true with respect to cumulative sentencing for §§ 846 and 848,[11] but the Supreme Court's recent opinion in *Garrett v. United States,* ____ U.S. ____, 105 S.Ct. 2407, 85 L.Ed. 2d 764 (1985), holds that separate prosecutions and punishments are permissible for § 848 and the underlying substantive predicate offenses. Although that case did not involve a § 841 conviction, we

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[11] *See Jeffers v. United States,* 432 U.S. 137, 149-50, 157, 97 S.Ct. 2207, 2215-16, 2219, 53 L.Ed.2d 168 (1977) (four-Justice plurality) ("For the purposes of this case, therefore, we assume, arguendo, that . . . § 846 is a lesser included offense of § 848"; "Congress did not intend to impose cumulative penalties under §§ 846 and 848."); *id.* at 159, 97 S.Ct. at 2220 (four-Justice concurrence in vacation of cumulative fines). *Garrett* distinguished *Jeffers* without purporting to affect its result, ____ U.S. at ____, 105 S.Ct. at 2419, although its affirmance of cumulative sentences and fines for the conspiracy and CCE counts is directly contrary to *Jeffers.*

think that its holding applies to that section as well.[12] In any event, because we vacate defendants' convictions on other grounds and we assume that all charges against each defendant will be retried together, we have no occasion to explore the full ramifications of *Garrett* as it relates to Ricks' and King's sentences.

[4-7] We must decide, however, whether the government sufficiently proved all the elements of the CCE charges against King and Ricks; if not, they are entitled to acquittal rather than merely a retrial on those charges. We think that the evidence was more than adequate to prove all of the elements of a § 848 violation that were charged, *see generally Lurz, supra,* 666 F.2d at 75-76, but we must decide what offenses may be used as predicates for the

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[12]Several other courts of appeals before *Garrett* were in accord ith our precedents, *see United States v. Gomberg,* 715 F.2d 843, 851 (3 Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1440, 79 L.Ed.2d 760 (1984); *United States v. Jefferson,* 714 F.2d 689, 701-03 (7 Cir.1983); *United States v. Middleton,* 673 F.2d 31, 33 (1 Cir.1982); *United States v. Chagra,* 669 F.2d 241, 261-62 (5 Cir.), *cert. denied,* 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982), while several others had held that cumulative punishments could be imposed for violations of §§ 841 and 848, *see United States v. Darby,* 744 F.2d 1508, 1530 (11 Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985); *United States v. Brantley,* 733 F.2d 1429, 1436-37 (11 Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985); *United States v. Mourad,* 729 F.2d 195, 203 (2 Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2700, 86 L.Ed.2d 717 (1985); *United States v. Phillips,* 664 F.2d 971, 1009 (5 Cir.1981), *cert. denid,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *cf. United States v. Oberski,* 734 F.2d 1030, 1033 (5 Cir.1984) (separate conviction and punishment for § 841 violation permissible if not actually relied on in establishing CCE); *United States v. Chagra,* 653 F.2d 26, 31-32 (1 Cir.1981) (same), *cert. denied,* 455 U.S. 907, 102 S.Ct. 1252, 71 L.Ed.2d 445 (1982); *United States v. Samuelson,* 697 F.2d 255, 260 (8 Cir.1983) (same), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1314, 79 L.Ed.2d 711 (1984). We presume that the latter group will prevail after Garrett.

CCE violation. Several propositions that we accept as settled guide our resolution of this issue: (1) 21 U.S.C. § 848 (b)(2)'s requirement of "a continuing series of violations" requires at least three violations;[13] (2) since § 848(b) refers to "violations of this subchapter or subchapter II of this chapter [21 U.S.C. §§ 801-966]," violations of 18 U.S.C. §§ 2 and 1952 do not qualify as predicate felonies for a CCE charge;[14] and (3) violations of § 841 may serve as predicate offenses and as the necessary three violations for a series.[15]

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[13] The Supreme Court's opinion in *Garrett* referred to the "three predicate offenses that must be shown to make out a CCE violation," ___ U.S. at ___, 105 S.Ct. at 240, and to "the three predicate offenses required to form the basis for a continuing criminal enterprise prosecution," *id.* at ___, 105 S.CT. at 2417. *See also id.* at ___ & n. 19, 105 S.Ct. at 2424 & n. 19 (Stevens, J., dissenting) (assuming that "continuing series" means at least three felony violations). Most of the other courts of appeals have so held. *See United States v. Sterling*, 742 F.2d 521, 526 (9 Cir.1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985) (No. 84-1177); *United States v. Sinito*, 723 F.2d 1250, 1261 (6 Cir.1983), *cert. denied*, ___ U.S. ___, 105 S.Ct. 86, 83 L.Ed.2d 33 (1984); *United States v. Graziano*, 710 F.2d 691, 697 n. 11 (11 Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *United States v. Samuelson*, 697 F.2d 255, 259 (8 Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1314, 79 L.Ed.2d 711 (1984); *United States v. Losada*, 674 F.2d 167, 174 n. 4(2 Cir.), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982); *United States v. Phillips*, 664 F.2d 971, 1013 (5 Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Chagra*, 653 F.2d 26, 27-28 (1 Cir.1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1252, 71 L.Ed.2d 445 (1982); *United States v. Johnson*, 575 F.2d 1347 (5 Cir.1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

[14] *United States v. Webster*, 639 F.2d 174, 181 (4 Cir.1981), modified on other grounds, 669 F.2d 185 (4 Cir.), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982).

[15] *E.g., United States v. Sterling*, 742 F.2d 521, 526-27 (9 Cir.1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2322, 85 LEd.2d 840 (1985); *United States v. Brantley*, 733 F.2d 1429, 1436-37 (11 Cir.1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985).

Ricks thus has no valid argument against retrial, because he was convicted of three violations of § 841 (counts 6, 7, and 8). King, however, was charged and convicted of only two violations of § 841 (counts 10 and 11), and his conviction under 18 U.S.C. § 1952 (count 3) does not qualify under § 848. His conviction under § 848 would thus be invalid if we were persuaded that the § 846 conspiracy conviction may not serve as one of the three requisite narcotics violations,[16] and that the government did not, or was not legally entitled to, prove some other qualifying violation that was not charged as a separate offense

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[16]We have previously stated in dicta that a § 846 conspiracy may not be used to prove the predicate, violation required by § 848(b)(1), *Lurz, supra,* 666 F.2d at 76; *accord United States v. Jefferson,* 714 F.2d 689, 702 n. 27 (7 Cir.1983); *but see United States v. Young,* 745 F.2d 733, 748-52 (2 Cir.1984), *cert. denied,* ____ U.S. __]__, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985); *United States v. Brantley,* 733 F.2d 1429, 1436 n. 14 (11 Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985); *United States v. Middleton,* 673 F.2d 31, 33 (1 Cir.1982); *cf. United States v. Michel,* 588 F.2d 986, 1000-01 (5 Cir.) (no opinion on issue), *cert. denied,* 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979), but we have also held that a distinct conspiracy may be used to prove the "series" and other requirements of § 848(b)(2). *Lurz* at 76-77. *Garrett* seems to support us on the latter point and to allow the government at least to count a § 846 violation as one of the three necessary for a series. The *Garrett* Court did not focus on the identity of the necessary predicate offenses, but Garrett was convicted of only two substantive violations and two conspiracy counts, so affirmance indicates that conspiracy violations may constitute a necessary part of the required series. *Cf. United States v. Darby,* 744 F.2d 1508 (11 Cir.1984) (convictions affirmed where on defendant convicted of two substantive offenses and CCE and other convicted of only two conspiracies and CCE charge), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985); *United States v. Bascaro,* 742 F.2d 1335 (11 Cir. 1984) (after court vacated § 846 and § 963 conspiracy convictions, only two substantive § 841 violations remained for defendant Villaneuva), *cert. denied,* ____ U.S. ____ 105 S.Ct. 3477, 87 L.Ed.2d 613 (1985).

in the indictment.[17] Since King did not object at trial on these grounds, and thus preserve the point for appeal, we need not resolve the merits of his possible arguments; we hold only that the district court committed no plain error in overlooking or implicitly rejecting these two points, and thus King's retrial is not barred.

V.

Defendants' other assignments of reversible error merit only summary treatment.

[8] A. We think that the evidence was legally sufficient to convict each defendant of the crime or crimes with which he or she was charged. There is thus no defendant ineligible for retrial.

[9] B. We see no error in the district court's denial of the motions of defendants Carter, Roberts and Lindsey

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[17] *Lurz* stated that "[i]t is simply incorrect for [defendants] to contend that a minimum of three substantive *convictions* is required to establish a § 848 violation." 666 F.2d at 78 (emphasis added). *See also United States v. Young*, 745 F.2d 733, 747 (2 Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985); *United States v. Sterling*, 742 F.2d 521, 5267 (9 Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985); *Sperling v. United States*, 692 F.2d 223, 2267 (2 Cir.1982), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1984); *cf. United States v. Brantley*, 733 F.2d 1429, 1436 n. 14 (11 cir.1984) (unnecessary to decide issue because defendant convicted on enough counts), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985); *United States v. Gombert*, 715 F.2d 843, 850 n. 4 (3 Cir.1983) (same), *cert. denied*,5 ____ U.S. ____. 104 S.Ct. 1440, 79 L.Ed.2d 760 (1984); *United States v. Michel*, 588 F.2d 986, 1000 n. 15 (5 Cir.) (same), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). King did not raise any objection in the district court to the structure of the CCE charge against him, so the government did not rely on this argument, and accordingly we do not decide whether the government's proof met this test.

for a severance. The bases for their motions simply did not meet the criteria of *United States v. Parodi,* 703 F.2d 768 (4 Cir.1983), especially because the lateness of the filing by Carter of his affidavits prevented an effective inquiry into whether all of the criteria were met. Since there must be a retrial, Carter's motion may be considered further by the district court if Carter continues to press it.

[10, 11] C. We think that the evidence was legally sufficient to permit the jury to conclude beyond a reasonable doubt that defendant Ricks was not entrapped into providing drugs to Smith, the police informant; nor do we think that Smith's efforts, at the behest of law officers, to obtain other drugs from Ricks constituted overreaching by the government and denied due process of law. Ricks' other attacks on the sufficiency of the proof to convict him are lacking in merit as we have previously stated.

[12, 13] D. We are of the opinion that the warrants authorizing the search of Carter's residence and his safe deposit box were issued on a proper showing of probable cause, and the searches and related seizures of evidence used at the trial were valid and not offensive to the Fourth Amendment. Similarly, we think that there was probable cause for search of the apartment residence of Ricks and Roberts and although a warrant had not isssued for the search, there were exigent circumstances for the search excusing the necessity of the warrant. *See United Staes v. Turner,* 650 F.2d 526 (4 Cir.1981).

E. As part of the government's case, it undertook to prove that trial counsel for Ricks had been paid $21,750 in cash by King, Ricks and Meredith over a four-year period to represent members of their drug distribution network when those members were arrested on narcotics charges. Such proof was highly relevant to the status of Ricks and

King as organizers or managers of a criminal enterprise because it would show their payment of fees for underlings who were in trouble. The attorney had been subpoenaed to appear before the grand jury but he was succesful in avoiding an actual appearance and submitting only a written summary of his testimony.

The government proposed to present this evidence at trial by a stipulation that avoided disclosure of the attorney's name. All defendants agreed but when the stipulation was offered, King objected on the grounds that his attorrney-client privilege would be violated and that the stipulation was inadmissible hearsay and if received would violate his rights of cross-examination and confrontation. The district court concluded to admit the stipulation but to afford King the opportunity to call the lawyer and to examine him about matters relating to the stipulation. King did not avail himself of that right.

Before us, King renews the arguments he made in the district court, and Ricks also contends that his conviction should be reversed because his lawyer was a damaging witness against him and he never validly waived the conflict of interest. We are not persuaded by these contentions.

[14, 15] First, we do not think that King's attorney-client privilege extended to the information that was proved. We stated in *United States v. (Under Seal),* 748 F.2d 871, 874 (4 Cir.1984), that the privilege "protects only confidential client communications; that is, communications not intended to be disclosed to third persons other than in the course of rendering legal services to the client or transmitting the communications by reasonably necessary means," relying upon our prior holdings such as *In re Grand Jury Proceedings (John Doe),* 727 F.2d 1352 (4

Cir.1984). Fees are not such confidential communications and evidence of their payment is therefore properly admissible. *See In re Special Grand Jury,* 676 F.2d 1005, 1009 (4 Cir.), *vacated on other grounds,* 697 F.2d 112 (4 Cir.1982) (in banc). It is true that *In re Special Grand Jury,* 676 F.2d at 1009, relying upon *United States v. Hodge & Zweig,* 548 F.2d 1347, 1353 (9 Cir.1977), appeared to recognize an exception to the no privilege rule where "a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." But that holding was displaced by our in banc order, 697 F.2d 112, and *Hodge & Zweig* may no longer be good law in the Ninth Circuit. *See In re Osterhoudt,* 722 F.2d 591, 593 (9 Cir.1983). Certainly its purported teaching has been rejected by other circuits. *See In re Shargel,* 742 F.2d 61 (2 Cir.1984); *In re Witnesses Before Special March 1980 Grand Jury,* 729 F.2d 489, 494 (7 Cir.1984); *In re Grand Jury Investigation,* 723 F.2d 447 (6 Cir.1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984); *In re Freeman,* 708 F.2d 1571, 1575 (11 Cir.1983). Additionally, the truly damaging aspects of the attorney's testimony related to fees paid by King, Ricks and Meredith *for others.* In these instances they were not clients and had no privilege.

[16] Second, King was given the opportunity to call the lawyer and to examine him., When he failed to do so, he cannot claim that he was denied his right of cross-examination and confronation.

[17] Third, we do not think that Ricks' claim of a conflict of interest is meritorious., The record discloses that he joined in the stipulation, and the attorney was not called as a witness. Hence he was not faced with the unseemly and ineffective position of arguing his own credibility.

The conflict cases on which Ricks relies all involve representation of multiple defendants by one or two lawyers. They are inapposite here. Ricks was his lawyer's only client at trial, and the fact that the lawyer's records had been subpoenaed over his objection and would be introduced at trial does not suggest that the lawyer was less than zealous and loyal in his representation of Ricks. Neither Ricks nor his lawyer objected to the lawyer's continuing role in the trial.

We therefore conclude that Ricks has no just cause for complaint. We caution, however, that the case would be entirely different if the lawyer had been called as a witness. In that event, ethical considerations as well as the rules of the district court would have prevented him from continued representation of Ricks. We suggest therefore that before a new trial begins, the district court should ascertain if King will now join in the stipulation or, if not, if he will assure the court that the lawyer will not be called as a witness. Absent joinder in the stipulation or such assurance, the district court should give careful consideration to severance of King's trial or disqualification of the lawyer as trial counsel.

[18] F. We do not think that the issue of King's identification was so central to the case against him or that the evidence of identification was so weak that the district court abused its discretion in declining to give the instructions based upon *United States v. Holley*, 502 F.2d 273 (4 Cir.1974), which King requested.

[19] G. As to defendant Frisby, we see no error in the admission into evidence of firearms seized on July 14, 1981 after a shootout between rival drug organizations over Frisby's objections that he was not present at that incident and there was no evidence that he ever owned or

possessed a gun. Frisby was tried as a co-conspirator and evidence admissible against a member of the conspiracy was admissible against him. We have held that evidence of firearms is admissible in narcotics conspiracy cases. *See United States v. Collazo*, 732 F.2d 1200, 1206 (4 Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 777, 83 L.Ed.2d 773 (1985).

REVERSED AND REMANDED.

WILKINSON, Circuit Judge, dissenting:

The majority suggests that "it was not unreasonable for defense counsel to have enough certainty in their interpretation of the court's remarks to negate any duty on their part to make a further inquiry or to request clarification." *Ante* at 460. I disagree. Given the ambiguities in the court';s statement, the lack of federal or local rules to justify deductive assumptions about jury selection, and the importance of exercising peremptory challenges intelligently, it was unreasonable at trial for defense counsel to gamble without a clarifying inquiry on the accuracy of their impression that the jury would be chosen from the first thirty names on the venire list. And it is now unreasonable on appeal for this court to excuse that gamble and to redeem an attorney error by liquidating the large economic and personal investment in a complicated five-week trial. Because I believe that the defendants received a fair trial, in the selection of the jury and in all other respects, I dissent from the reversal of these convictions.

I

Proper analysis of this case begins with an examination of the trial court's response to the prosecutor's inquiry about the then imminent jury selection. The majority's

contrary assertion that it need not determine if "the district court did or did not positively tell counsel that it would select active jurors from the top of the list," *ante* at 460, begs the question. The exchange between court and counsel is crucial because it helps to resolve the decisive issue on appeal: whether a reasonable attorney would have requested clarification before basing all peremptory challenges on the principle that informed the strikes of these defendants.

In eschewing an examination of how positively the trial court spoke and in pointing to the undisputed good faith of defense counsel, the majority addresses this appeal in part by asking whether, or in what sense, the lawyers actually understood the proposed method of jury selection. Such a "subjective" approach to the dispute suffers in a heightened degree from the problems that are often associated with the similar interpretation of contracts — the difficulty of ascertaining a party's innermost thoughts and the disingenuousness of characterizing law as a realization of consent rather than as an imposition of forms and obligations. *See* A. Corbi, *Corbi on Contracts* § 106. These disadvantages of the subjective approach are further magnified by the failure here of the usual objections to the rival "objective" method. In a courtroom, perhaps more than any other place, words may be held to precise meanings, parties may be charged with a common knowledge of those definitions, and the authorization for legal enforcement may be traced most fairly to a formal course of rulemaking rather than to an effectuation of any personal intentions. For all of these reasons, the most valuable perspective in this case is the familiar construct of the reasonable attorney and the most valuable evidence is the set of external manifestations on which that attorney would rely in exercising her peremptory challenges.

Looking through this perspective at this evidence, I believe that reasonable attorneys here would have sought amplification of the trial court's remarks before launching off on an interpretation of their own. The trial court's statement, quoted *ante* at 459, was definite only in declining to describe any specific method that the court intended to use to choose the jury. Asked if it would proceed from the top of the venire list, the court began its response with "Well, I can't tell at this point, as far as strikes and so forth. . . ." This declaration of uncertainty was not withdrawn, nor was it transformed into a commitment by the court's qualifying note about previous jury selections. No particular pattern was identified or precise expectation created by the observation that "[I can't tell at this point . . .] but *ordinarily* I start from the top, *not any rigid number,* counting from the top . . ." (emphasis added). Finally, the court's concluding remarks were tentative, elliptical, and ambiguous, venturing only that "it would be reasonably fair to say, if you want to exercise your strikes mostly at the top, and if you're satisfied with the top, don't strike there." Far from saying what the defense counsel say they heard, this last clause suggested that counsel might want to make their challenges someplace other than at the top of the list and thereby implied an intention to choose the jury in part from someplace other than the top.

The court also conveyed the same impression by distributing to the attorneys a list of fifty-seven names on which to make their strikes. If the court had intended to confine itself to the first thirty names, it need only have given counsel a part of the full venire list. While the distribution of a longer list is not dispositive as to the court's intentions, it was an additional factor suggesting the appropriateness of a clarifying inquiry.

The court's words and actions thus provided several dif-

ferent signals that warned against any exclusive concentration of peremptory strikes. First, the trial court never promised to use any specific method of jury selection. Second, and conversely, the trial court expressly explained that it was uncertain about the course that it intended to take. Third, the trial court in different ways indicated that it might follow a system other than picking solely from the top of the list. A reasonable attorney would accordingly have found no predicate in the court's remarks for an effective contraction of the venire, and defense counsel acted improperly to the extent that they relied upon the ambiguous statement in making such a contraction.[1]

Nor would a reasonable attorney have reached the defense counsel's interpretation by application of any laws governing the selection of jurors from a fully qualified venire. Few such rules exist, and none of them required the trial court to choose from a minimum fraction of the eligible candidates. Although the majority today endorses such a practice, *ante* at p. 459, n. 4, the law since at least 1894 has been that the mode of designating and empanelling jurors lies within the control olf trial courts, subject only to Congressional restriction and to "such limitations as are recognzied by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses." *Pointer v. United States,* 151 U.S. 396, 407-08, 14

[1]It is worth note that at least one reasonable attorney did not share the defense counsel's interpretation of the court's statement. The prosecutor apparently first assumed that the court would select the jury from the top of the venire list. He properly sought confirmation of this assumption, and when the court responded to his inquiry he interpreted the statement to mean that the court would choose from the entire venire.

S.Ct. 410, 414, 38 L.Ed. 208 (1894).[2] The latter concern, the constitutional requirement of an impartial jury, is not relevant here. The trial court excused eight venire members for cause, all of them at the request of the defendants. On appeal the defendants allege no cognizable prejudice among the active jurors. This case does not involved a biased jury, or even an unfair transfer to the defendants of the burden of avoiding a biased jury. *Cf. United States v. Allsup,* 566 F.2d 68 (9th Cir.1977). The principle that a trial court must empanel an impartial jury therefore could not have suggested to counsel any particular understanding of the court's intended method of selection.

The other limitation that *Pointer v. United States* places on trial court discretion, that of deference to legislation and to authorized rulemaking, also would not lead a reasonable attorney to believe that the trial court intended to draw only from the first thirty names on the fifty-seven name venire list. Fed.R.Crim.P. 24(b) provides only that defendants in a felony trial may strike ten candidates from the venire.[3] The rule does not prescribe a procedure for paring the venire or define an extent to which the ten peremptory challenges must influence the eventual composition of the jury. To the contrary, jurists since Joseph Story have observed that "the right of peremptory challenge is not, of itself, a right to select, but a right to reject

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[2]A trial court might also control its own discretion by promulgating a local rule. The appellants do not argue that any such local rule existed or was violated in this case. The situation is therefore different from *United States v. Sams,* 470 F.2d 751, 752 (5th Cir.1972) (peremptory challenges impermissibly compromised when "without prior announcement to counsel the trial judge utilized a method of selecting a jury that varied from the local custom").

[3]The trial court in this case granted the defendants two additional challenges, which made a total of twelve.

jurors," *United States v. Marchant and Colson,* 25 U.S. (12 Wheat.) 480, 482, 6 L.Ed. 700 (1827), and cases since *Marchant and Colson* have upheld a wide variety of methods for the exercise of strikes, methods that range not only in format but also in the substantive force that they create for peremptory challenges. *See, e.g., United States v. Marchant and Colson* (conflicting strikes by co-defendants); *Hanson v. United States,* 271 F.2d 791 (9th Cir.1959) (simultaneous exercise of challenges by prosecution and defense); *United States v. Anderson,* 562 F.2d 394 (6th Cir.1977) (local rule precluding challenges to previously passed jurors); *United States v. Blouin,* 666 F.2d 796 (2d Cir.1981) ("jury box" system requiring defendant to exercise challenge without knowing entire present composition of jury); *Rosales-Lopez v. United States,* 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (limitations on access of counsel to *voir dire* inquiries that would guide exercise of challenges). Not suprisingly, courts and commentators have repeatedly remarked on this absence of settled patterns for final jury selection. *United States v. Sams,* 470 F.2d 751, 755 n. 1 (5th Cir.1972); *United States v. Turner,* 558 F.2d 535, 537 (9th Cir.1977); 2 C. Wright, *Federal Practice and Procedure: Criminal* § 387. In the context of such notorious silence in the rules and variety in the courts, no reasonable attorney would presume to extract a certain meaning from a trial court's uncertain statement about the jury selection procedure.

And *a fortiori,* as law students say, no reasonable attorney would dare extract the *most favorable* meaning from the trial court's non-committal statement. The Federal Rules of Criminal Procedure obviously do not require that the exercise of peremptory challenges to be administered in a fashion that allows defendants the greatest possible influence over the final jury composition. In the

absence of any such rule, the proper interpretative attitude of counsel should be one of caution. The reasonable attorney practices in partnerhsip with the prudent attorney. Furthermore, the usual duty of circumspection applies with special force to matters of special significance, and as the Supreme Court has noted, the entitlement to peremptory challenges is "one of the most important of the rights secured to the accused." *Swain v. Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), *quoting Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). This often-quoted characterization corresponds with the belief of many trial lawyers that cases can be won or lost on the basis of effective *voir dire* and peremptory challenge. *See generally* H. Zeisel & S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stanford L.Rev. 491 (1978). The strategic potential attributed to peremptory strikes has inspired much ingenuity in the theory of determining the best use of the challenges, and the same potential should also inspire equal care in the practice of ensuring the actual preservation of the challenges. Such care would not reasonably include risking part of the value of the challenges on even a slight chance of erroneously interpreting a trial court's coment.[4]

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[4]These defendants did enjoy part of the value of their challenges despite the confusion that resulted in this appeal, for the final jury included none of the venire members whom the defense counsel struck. The majority assumes that the district court never considered these candidates: an equaly fair assumption is that the district court might have chosen the candidates but for the fact that they were rejected by defense counsel. The court's own statement supports the latter assumption; it noted that it might have "picked one of those people that you struck as the foreman."

II

The importance of peremptory challenges explains from the viewpoint of the bar why a hint of ambiguity should alert counsel to seek further clarification before risking a particular course of selection. From the viewpoint of the bench, the same rule follows from the importance to the judicial system of prompt resolution of procedural controversies. This concern is most familiar in the context of the duty of contemporaneous objection. If a reasonable attorney cannot be sure wheter the trial court is acting properly, the lawyer must usually object at the moment of court action or else forfeit the uncertain point. *See, e.g.*, F.R.E. 103(a); Fed.R.Crim.P. 30; *Wainwright v. Sykes,* 433 U.S. 72, 88-90, 97 S.Ct. 2497, 5507-08, 53 L.ED.2d 594 (1977). Similarly, if a reasonable attorney cannot be sure how the trial court is acting, the lawyer should inquire at that moment or else forfeit the uncertain point.

Here the interests served by a contemporaneous inquiry are similar to those served by the duty of contemporaneous objection. *See Wainwright,* 433 U.S. at 88-90, 97 S.Ct. at 2507-08; *Henry v. Mississippi,* 379 U.S. 443, 463, 85 S.Ct. 564, 575, 13 L.Ed.2d 408 (1965) (Harlan, J., dissenting). The trial judge can clarify the selection procedures at the outset before the time and effort of trial participants have been expended. The finality of criminal judgments would be encouraged. Sandbagging, whereby counsel forego inquity of the court, exercise their peremptory challenges on the most favorable interpetation of an ambiguity, and then take exception when that interpretation is not followed, would be discouraged.

It would be ideal, of course, for the trial court to explain to counsel the procedure for jury selection with perfect clarity. It would be preferable if there were "local rule of court spelling out the procedure for exercising peremptory

challenges in criminal cases," *See United States v. Turner,* 558 F.2d at 537. But desirability of reform does not relieve courts from dealing with the world that confronts us. I am not convinced that trial judges are so sensitive, trial lawyers so bashful, or relations between the two so brittle and uncommunicative that we cannot require of counsel a respectful inquiry without risking the ire or annoyance of the bench. Nor, in my judgment, are the normal obligations on government to give adequate notice of rights to criminal defendants shifted by encouraging an inquiry in the event that notice itself is, for understandable reasons, not clear.

The instant case well illustrates the interests that are served by a requirement of contemporaneous inquiry. The trial of these defendants lasted for five weeks and filled a transcript of more than four thousand pages, statistics that barely hint at the time, effort, and money that the public has invested in this case. Today the process begins again, probably at an even greater cost. Inevitably, other litigants will now be delayed or denied the use of finite judicial resources. The heavy burden thus placed on all litigants by a simple failure to communicate must be distributed through an equally heavy burden on each litigant to avoid confusion and misunderstanding. If a trial court statement admits of different meanings, and particularly as in this case of sharp abmguity, counsel should ask the court for clarification rather than asking society to insure the risks of uncertain reliance. In holding the conduct of these defense attorneys to have been reasonable, the majority adopts a standard of behavior that does not adequately respect the important values of fairness through judicial efficiency, concerns that in our legal system must often be advanced by influencing the conduct of counsel.

I would affirm these convictions.

APPENDIX B

United States of America, Appellee, v. Thomas Calvin Ricks, a/k/a Joe Dancer, Appellant; United States of America, Appellee, v. James A. Carter, Appellant; United States of America, Appellee, v. Marcell Moffatt, a/k/a Black Barney, Appellant; United States of America, Appelle, v. Stanley Rodgers, Appellant; United States of America, Appellee, v. Kerney William Lindsey, a/k/a Wilco, Appellant; United States of America, Appellee, v. Beatrice Roberts, Appellant; United States of America, Appellee, v. Maurice David King, a/k/a Peanut, Appellant

NOs. 83-5060(L), 83-5061, 83-5082, 83-5083, 83-5084, 83-5066, 83-5081

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Slip Opinion

October 2, 1986, Decided

APPEAL-STATEMENT:

Appeals from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, Chief District Judge. (CR-H 82-00401).

COUNSEL:

Ransom J. Davis (H. Russell Smouse; Harry J. Matz; Melnicove, Kaufman, Weiner & Smouse, P.A. on brief) for Appellant James A. Carter; Stuart R. Blatt for Appellant Beatrice Roberts.

W. Gary Kohlman (Kohlman & Fitch; Kenneth Michael Robinson on brief) for Appellant Maurice David King.

James B. Moorhead, Assistant United States Attorney (Brookinridge L. Willcox, United States Attorney.

J. Frederik Motz, United States Attorney; Stephen Bailey, Second Year Law Student on brief) for Appellee.

OPINION BY: WINTER

OPINION:

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, Slip Opinion

SPROUSE, ERVIN, CHAPMAN, and WILKINSON, Circuit Judges; sitting in banc.

WINTER, Chief Judge

These appeals have been reheard in banc. We conclude that the judgments of conviction for all defendants must be reversed and they must be granted new trials.

I.

The facts are set forth in the panel opinions and need not be repeated here. United States v. Ricks, 776 F.2d 455 (4 Cir. 1985). The panel majority ruled that the district court committed reversible error when it failed, albeit inadvertently, to give defense counsel unequivocal advice as to the section of the list of jurors from which the jury would be selected. The failure, it concluded, resulted in an impermissible dilution of defendants' statutory right to peremptory challenges of prospective jurors. We too hold, for the reasons set forth by the majority and the additional reasons set forth below, that there was an impermissible dilution of defendants' statutory right to peremptory challenges of prospective jurors necessitating reversal of their convictions and the grant of a new trial.

Because the panel majority granted the defendants a new trial, it expressed its view on a number of issues which were likely to arise on retrial and it withheld decision on others. As to those which were decided, we too make the same rulings for the reasons advanced by the majority. We also decide one issue reserved by the majority, and hold that King may be convicted of a violation of 21 U.S.C. § 848 upon proof of two violations of 21 U.S.C. § *841 plus proof of a violation of 21 U.S.C. 846. Stated otherwise, we rule that a conviction of a conspiracy under 21 U.S.C.* § 848 may be a predicate offense for conviction of violating 18 U.S.C. § 848.

II.

The majority panel opinion expresed two thoughts which we think are an alternate basis of decision. First, in footnote 4 it was said "that an excessively large venire could have the . . . offset [of diluting the right to peremptory challenges] even if the procedure were clearly explained. The usual practice with a struck jury system, which we encourage, is for the list to contain only the approximate number of necessary potential jurors." Next, in footnote 9, it is suggested that "absent a local rule of court or established local practice about how a jury will be selected and how peremptory strikes should be exercised with respect to a large venire, there is a duty on the part of the court to give clear, unambiguous instructions to counsel about the procedure to be followed and that a failure on the part of the court in this respect is plain error." Closer study of the authorities sustaining the validity of a "struck jury" system leads us to hold that it is essential to the validity of a jury chosen by the "struck jury" system that the list given to counsel contain only the approximate number of necessary potential jurors, or, if a larger list is given, that the court give clear, unambiguous instructions

about the portion of the list, containing not more than the approximate number of necessary potential jurors, from which the jury will be selected.

A.

The right to peremptory challenges has been characterized as "one of the most important of the rights secured to the accused." Pointer v. United States, 151 U.S. 399, 408 (1894). Although not a constitutional right, "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Swain v. Alabama, 380 U.S. 202, 219 (1965). Most recently, in a case limiting the use of peremptories to exclude veniremen on the basis of race, the Supreme Court again acknowledged the historic function of peremptory challenges "as one means of assuring the selection of a qualified and unbiased jury." Batson v. Kentucky, No. 84-6263, 54 U.S.L.W. 4425, 44228 (U.S. Apr. 30, 1986).

The method for exercising peremptory challenges depends upon the method of jury selection. In the "jury box" system of jury selection, the parties exercise their challenges against jurors already seated in the box, and who will remain on the jury unless challenged. This case, however, concerns the use of the "struck jury" method of jury selection where the trial judge tenders to each party a list of qualified veniremen and each side exercises its peremptories against the names on the list. If, after each side exercises its strikes, there remains more than twelve persons on the list, the trial judge must decide which twelve will constitute the jury.

For a fuller discussion of differences between the "struck jury" and "jury box" methods of administering peremptory strikes, see United States v. Blouin, 666 F.2d 796 (2 Cir. 1981).

It is self-evident that the right to a given number of peremptory challenges becomes less and less effective as the list of potential jurors against which the challenges must be exercised grows larger than the approximate number of veniremen needed to comprise a jury. When the "jury box" method of selection is used, a party knows that each time he strikes a venireman sitting in the box, he is assured of removing someone from the panel who otherwise would serve as a juror. But when the trial court submits a struck jury list on which more than twelve names will remain after each side exercises its peremptory strikes, and the judge then selects the jury in a manner not previously disclosed, the defendnat faces the prospect – the actuality in the instant case – of wasting strikes on veniremen the trial judge ultimately chooses to exclude from the jury.

The effect of a larger than necessary "struck jury" list is, thus, to dilute the defendant's right to exclude potential jurors of whom he disapproves, but for whom he lacks a basis for an objection for cause. The Supreme Court has stated: "The denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice [citations omitted]. 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' " Swain, supra, at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). See also Pointer, supra, at 408 ("Any system for the impanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.") We think it clear that the dilution that results from the court submitting an overly-large struck jury list without limiting instructions hinders the full, unrestricted exercise of peremptory challenges and violates an essential part of the right to trial by jury.

We reach this conclusion from our review of the history of the struck jury system.

B.

Swain v. Alabama, 380 U.S. 202, 217 (1965), noted that "[t]he system of struck juries has its roots in ancient common-law heritage." In a footnote the Court describes how the jury was selected: "Historically 48 names would be selected from a special jury list and each side would alternately strike 12 names, the remaining 24 being summoned for the case." Id. at 217 n.21. The Court there cites to Blackstone who explains that this practice of selecting "special juries" was "originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality." 3 Blackstone's Commentaries 357 (1897) (emphasis in original). Common juries were selected by the "jury box" method. Id. at 358.

The common-law method might seem to support the practice of the district court in the instant case, because after each side exercised twelve peremptory strikes, the remaining number (24) was twice as large as necessry for the jury. But at common law, the veniremen wer summoned by the sheriff after the parties exercised their strikes against the list. Experience demonstrated that twenty-four veniremen were usually necessary to ensure that at least twelve persons appeared. J. Bentham, The Elements of the Art of Packing as Applied to Special Juries 31 (1821); see also, Nesmith v. Atlantic Ins. Co., 8 Abb. Pr. 423, 424 (N.Y. 1859). When less than twelve persons appeared, the court would simply complete the jury with "persons present in court." 3 Blackstone's Commentaries 385 (1897). Thus there was reason to require that peremptories be exercised against an excessively large list. By contrast, today there is not the same need to call an excessive number of

veniremen because there is better attendance and statistically the number of excuses for cause can be determined with great accuracy. As a result, a sufficient number of veniremen to constitute a jury after the exercise of peremptories is usually present at the time that peremptory strikes are exercised. Further, at common law, if more than twelve veniremen did appear, the trial judge did not simply select any twelve to serve as jurors. In England, the twelve whose names "stood first" on the list were selected. Bentham, supra, at 31. Thus counsel had some indication of the portion of the list from which jurors would be chosen. In this country, Swain cites the New Jersey case of Brown v. State, 92 N.J.L. 666, 42 A. 811, aff'd, 175 U.S. 172 (1899) as illustraive of the struck jury system at common law in the United States. Swain, supra, at 217 n.21. Under that system, once the "special jury" method was employed to obtain twenty-four potential jurors, the petit jury was selected from the twenty-four by using the "jury box" method of selection. In this last step of selection, the defendant was given an additional set of peremptories.

In Brown, the defendant challenged the struck jury system of New Jersey. At one time the New Jersey system was exactly as Swian described: each side struck 12 names from a list of 48, leaving 24. By an Act of 1898 the struck jury system was modified so that the two parties each struck 24 names from a list of 96, leaving 48. The 98 names are "placed in the box" and "the jury for trial of the case is drawin in the usual way." 42 A. at 921. The Court of Errors and Appeals of New Jersey explained the system:

From the 96 names selected, the prisoner or his counsel is permitted to strike 24. The 48 names that remain afer the prosecutor and the defendant have completed the striking are returned as the panel from which the jury of

12 men is to be selected. The list form which such panel is to be selected is in the hands of the defendant or his counsel at least 12 days before the impanelling of the jury. Ample time is afforded to him between the striking of the panel of jurors to be returned and the time of drawing the trial jury to enable counsel to ascertain grounds of objection to individual jurors which would be available upon a challenge for cause and the defendant is allowed in addition 5 peremptory challenges as the names are drawn from the box. As the right of challenge is not a right to select, but to exclude, the accused on the striking of the jury has power to exclude 24 at will, and at the drawing of the names from the box to form the jury of 12 he has in addition 5 peremptory challenges.

Id. at 818 (emphasis added). When the New Jersey court describes the second strage of the selection, the drawing of the names from the box, it is describing the "jury box" method. At this point the defendant is granted an additional five peremptory strikes against those drawn from the box to constitute the petit jury.

Thus the common-law heritage does not support the challenged practice here. The rationale for summoning more than the minimum number required to draw a jury does not exist today where the veniremen are summoned and are present in the courtroom before any exercise of peremptory challenges. And even at common law, the defendant knew in advance of the means by which the final selection would be made. Certainly New Jersey's two-tiered system of peremptories reflects the common law's exceedingly strong belief in the importance of peremptory challenges.

The Supreme Court first considered and upheld the validity of a struck jury system in Pointer v. United States, 151 U.S. 396 (1894). Under that Arkansas system, "[t]he

defendant and the government were . . . furnished, each, with a list of the thirty-seven jurors [generally qualified under the law], that they might make their respective [peremptory] challenges, twenty by the defendant and five by the government, the remaining first twelve names, not challenged, to constitute the trial jury." 151 U.S. at 399 (emphasis added). See also id. at 409 (emphasis added) (the defendant had "notice from the court that the first twelve unchallenged would constitute the jury"). The defendant objected, claiming that his right to peremptory challenges was impaired because he had to strike from a list of thirty-seven potential jurors, not knowing who the government would strike; consequently, the defendant might strike the same person the government struck, and waste a peremptory strike.

The Court rejected the defendant's claim by noting the fairness of the procedure employed:

Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first twelve on the list, not challenged by either side, would constitute the jury.

Id. at 411 (emphasis added). While it is not clear from the opinion that the defendant's knowledge that the first twelve unchallenged jurors would constitute the jury was necessary to the Court's decision to uphold the struck jury system, it was certainly a significant factor. In addition, as the review of further cases will demonstrate, the trial court's decision to submit a number of qualified jurors

(37) equal to the combined number of peremptory challenges (20 defense and 5 prosecution) plus the twelve jurors needed for trial, was not accidental. It was simply following the standard and historic means of employing the struck jury method.

Decisions in several of our sister circuits also demonstrate that the struck jury list is traditionally limited to the number necessary to provide the petit juiry. See United States v. Blouin, 866 F.2d 796 (2 Cir. 1981); United States v. Flaherty, 668 F.2d 566 (1 Cir. 1981); United States v. Morris, 623 F.2d 145 (10 Cir.), cert. denied, 448 U.S. 1065 (1980); United States v. Williams, 447 F.2d 894 (5 Cir. 1971); Amsler v. United States, 381 F.2d 37 (9 Cir. 1967). Although none of these cases actually holds that it is error for a district court to submit a jury list to counsel with more names than required, each case upholds a "struck jury" system including such a limit. In Blouin, the court explains:

Under the "struck jury' system, an initial panel is drawn by lot from those members of the array who have not been challenged and excused for cause; the size of this initial panel equals the total of the number of petit jurors who will hear the case (twelve in a federal criminal trial), plus the combined number of peremptories allowed to both sides (normally sixteen in federal felony trials, Fed. R. Crim. P. 24(b)). Counsel for each side then exercises their peremptory challenges, usually on an alternating basis, against the initial panel until they exhaust their allotted number and are left with a petit jury of twelve.

Id. at 796-9 (emphasis added). In Amsler, the district court submitted a list of thirty-seven veniremen to provide a jury of twelve with our alternates where the defense had thirteen peremptory strikes, the government had six, and each side was given an additional strike against the alternates.

In upholding this struck jury system, the Ninth Circuit quoted the district judge's statement that "at all times counsel knows who their ultimate jury is going to be, and it is not exercising a challenge and not knowing who you might draw subsequently." Id at 44. The court concluded that the system used "was eminently fair to both sides." Id. See also Flaherty supra, at 601 (33 names on list; minus 7 government peremptory strikes, 12 defense peremptory strikes; leaving a jury of 12 and 2 alternates); Morris, supra, at 151-52 (22 names on list; minus 6 government strikes, 10 defense strikes; leaving a jury of 6 with alternates to be selected separately); Williams, supra at 996-97 (32 namess on list; minus 6 government peremptory strikes, 10 defense peremptory strikes, 1 additional strike for each side against the alternates; leaving a jury of 12 and 2 alternates).

Thus, in these five cases upholding the struck jury syst em, in addition to Pointer, the districdt courts had all limited the jury lists to the number of potential jurors necessary to provide a petit jury after the exercise of peremptory strikes. It is significant that all of these cases describe the system as such, because after an extensive review of federal cases, we have found no case supporting the contrary view. Thus, in every case where a court explained numerically how the struck jury system operated, the district court had provided no more names than necessary to fill out the jury panel. This fact at least indicates that the procedure followed by the district court in the instant case, i.e., tendering a longer list, without clearly identifying the place where selection of the jury would begin, is without precedent.

More significantly, from the historic operation of the struck jury system and from the careful recitation of facts showing that in each case upholding its validity, the num-

ber of veniremen supplied to counsel did not exceed the number of jurors actually rquired plus the authorized number of peremptory challenges, we conclude that a limitation of this kind is an essential requirement of a valid struck jury system. It follows that if a list contains more names than are needed under this formulation, it becomes the duty of the district court to provide the functional equivalent by stating in unequivocal language the portion of the list which contains not in excess of the number of veniremen necessary to achieve a jury from which actual jury selection will be made, and we so hold. The failure to do so in this case is reversible error.

III.

The majority panel opinion did not undertake to decide King's contention that a conviction under 21 U.S.C. § 846 could not serve as one of the three requisite narcotics violations upon which there could be a conviction for violation of 21 U.S.C. § 848. It noted, hwoever, that dicta in United States v. Lurz, 666 F.2d 69 (4 Cir. 1981), cert. denied, 459 U.S. 843 (1982), indicated that his contention was meritorious.

Upon consideration by the in banc court, we conclude that King's contention is lacking in merit and that the dicta in Lurz to the contrary is not the law of this circuit. We are persuaded by the holdings in our sister circuits that the government may rely on a § 846 violation to esablish a § 848 offense, and we conclude to follow them. See United States v. Schuster, 769 F.2d 337, 345 (6 Cir. 1985); cert. denied, 108 S.Ct. 1210 (1986); United States v. Jones, 763 F.2d 518, 524-25 (2 Cir.), cert. denied, 106 S.Ct. 386 (1985); United States v. Young, 745 F.2d 733, 748-52 (2 Cir. 1984), cert. denied, 105 S.Ct. 1842 (1985); United States v. Brantley, 733 F.2d 1429, 1436 n.14 (11 Cir.

1984), cert. denied, 105 S.Ct. 1362 (1985); United States v. Middleton, 673 F.2d 31, 33 (1 Cir. 1982).

Before the in banc court, King called attention to the portion of the record in which he preserved the point for review on appeal. The majority panel opinion erroneously thought that the issue was not preserved.

REVERSED AND REMANDED.

DISSENT BY: WILKINSON

DISSENT:

WILKINSON, Circuit Judge, with whom Circuit Judges Donald RUSSELL and K.K. HALL join, in dissenting:

The court today announces, and applies retrospectively, a new rule that affects every criminal trial in this circuit: district judges must limit each venire to the minimum number necessary to accommodate peremptory strikes and to fill a jury. I cannot agree with the court's assumption of power or with its assumptions about the nature of peremptory challenges. The enactment of this new rule overrides the trial courts' traditional discretionary authority in an area of long-running debate and considerable creativity. And the premises of the new rule overstate the defendants' peremptory rights and understate the value of a large venire. I therefore continue to dissent from the reversal of these convictions.

The panel opinions primarily addressed the duty of counsel to seek clarification of an ambiguous court statement about jury selection. I adhere to my views on that issue but concentrate here on the point that no rules "required the trial court to choose [jurors] from a minimum fraction of the eligible candidates." United States v. Ricks,

776 F.2d 455, 468 (4th Cir. 1985) (Wilkinson, Jr., dissenting).

I.

The majority holds that the size of the venire caused "an impermissible dilution of defendants' statutory right to peremptory challenges of prospective jurors." Ante at 5. Whether any "dilution" occurred, however, depends on the definition of the "statutory right to peremptory challenges." The first place to look for that definition is the statute in question, or in this case, Fed.R.Crim.P. 24(b). That rule, which is not even mentioned by the majority, says nothing about the size of the venire. It provides only that "[i]f the offense charged is punishable by imprisonment for more than one year, the government is entitled to six peremptory challenges and the defendant or defendants jointly to ten peremptory challenges . . . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." This statutory right to exclude ten venire members was fully satisfied here. The defendants struck twelve names from the list, and none of those people served on the jury. If not for the defendants' strikes, as the district court pointed out, one of the excluded venire members might have become the jury foreman.

Although the size of the venire did not affect the defendants' right to strike ten venire members, it did affect their ability to use the strikes to determine the composition of the jury. This latter, greater, power is what the majority finds has been "diluted." But apart from the Rule 24(b) authority to veto a designated number of venire members — to reject the most objectionable veniremen — the defendants simply had no right to determine the composition of their jury. It has long been settled that "[t]he right of peremptory challenge is not, of itself, a right to select, but

a right to reject jurors." United States v. Marchant and Colson, 25 U.S. (12 Wheat.) 480, 482 (1827). The challenge may help to dispel a defendant's fears of juror bias, but it does not go so far as to guarantee that every venireman not struck will be chosen. Rule 24(b) says nothing about the force of the challenges, nothing about the permitted size of the venire, nothing about any relationship between the size of the venire and the number of challenges. No other rule or statute addresses these subjects or confers the right the majority manufactures.

The majority believes that the right of peremptory challenges extends beyond the statutory entitlement set forth in Rule 24(b). Its reference to a "dilution" imply that the right also guarantees an extraordinary measure of influence in the exclusion of qualified venire members, and its requirement of a minimum venire reflects an assumption that the challenges must offer defendants the maximum influence possible for the given allotment of strikes. The majority seeks to base this assumption on authority that ensures a "full" exercise of the right to peremptory challenges. Ante at 9. The cases, however, do not support that interpretation.

Pointer v. United States, 151 U.S. 396 (1894), the leading Supreme Court case on the "struck jury" system, directly refutes the majority's premise that the right to a specific number of peremptory challenges implies a right to the greatest possible power of exclusion. As in Lewis v. United States, 146 U.S. 370 (1892), the trial court required the defendant to exercise his twenty peremptory challenges without knowing which venire members the prosecution would strike. The effect of this procedure was, by the logic of today's majority, a "dilution" of the statutory right of peremptory challenges: the defendant faced the prospect of exhausting strikes on venire members who, even with-

out the defendant's challenge, would not have become jurors. Cf. ante at 8. The defendant would have enjoyed an "undiluted" influence if the prosecution had first used its challenges, and some jurisdictions did require or suggest that the prosecutionn strike first. Pointer v. United States, 151 U.S. at 410. But the Supreme Court held unanimously that the contested procedure was not "in derogation of the right of peremptory challenge belonging to the accused" because the defendant "was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him." Id. at 411; see also id. at 412 ("He was only entitled, of right, to strike the names of twenty * * * that a defendant "cannot succeed in his claim simply by showing that he could, under some procedure, have made more effective use of his peremptories." United States v. Blouin, 666 F.2d 798. By relying on the observation that "the right to a given number of peremptory challenges becomes less and less effective as the list of potential jurors against which the challenges must be exercised grows.

The cases involving the "jury box" method of selection also demonstrate that the trial court may adopt a procedure that significantly limits the relative value of the challenges. Under this system, the last peremptory strike is exercised before the last replacement is known. If the parties use all their challenges, "each side must accept at least one juror whom he has not had an opportunity to challenge." United States v. Blouin, 666 F.2d 796, 798 (2nd Cir. 1981). Moreover, trial courts may and do vary the "Jury box" system in ways that further restrict the defendant's entitlement. Id. at 799; see also St. Clair v. United States, 154 U.S. 134, 147-48 (1894); United States v. Pimentel, 654 F.2d 538, 540-41 (9th Cir. 1981); United States v. Anderson, 562 F.2d 394, 396-97 (6th Cir. 1977);

United States v. Mackey, 345 F.2d 499, 501-03 (7th Cir.), cert. denied, 382 U.S. 824 (1965). The larger," ante at 8, the majority ignores that lesson and a substantial body of case law.

II.

The majority opinion also portends an unfortunate shift of power in jury selection toward appellate forums. The majority substitutes appellate fiat for trial flexibility in an area where district judges perform the daily duties of administration and where diversity and experimentation have long been permitted and encouraged. Indeed, as the extraordinary variety both of "jury box" and "struck jury" systems demonstrate, see United States v. Blouin, 666 F.2d at 797-8, trial courts have been forums where different theories of selection have held sway. Rule 24(b) accommodated this variety by refusing to prescribe a particular procedure. Appellate judges ought likewise to resist the temptation to impose their own preferences upon this welcome diversity of practice and recognize that "the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses." Pointer v. United States, 151 U.S. at 407-08; see also Lewis v. United States, 146 U.S. at 379; St. Clair v. United States, 154 U.S. at 147-48. The majority does not acknowledge this flexibility entrusted to the district court. Nor does the majority consider the possible explanations for the manner in which this district court exercised its discretion.

The limitations of trial court discretion suggested by Pointer v. United States do not apply here. The defen-

dants received all of the challenges prescribed by Congress. They were not forced to use their strikes to secure a qualified jury and do not argue now that any juror should have been excused for cause. Cf. United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977). Nor do they argue that the district court violated the prior commitment of any local rule.

Cf. United States v. Sams, 470 F.2d 751, 752 (5th Cir. 1972).

A large venire improves the trial process because it enhances the likelihood that the jury will include a fair cross-section of the community. See Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial"); see also 28 U.S.C. § 1861. The Surpeme Court has noted that a small jury panel is unlikely to allow adequate minority participation. Ballew v. Georgia, 435 U.S. 223, 236-37 (1978). "Further reduction in size will erect additional barriers to representation." Id. at 237.

The same principles apply to the size of the venire. If a minority comprises 10% of the population from which the venire is drawn, venires with thirty members are more than twenty times more likely to include no members of that minority than venires with sixty members. See F. Mosteller, R. Rourke & G. Thomas, Probability with Statistical Applications (2nd ed.) at 138-39. The difference is not a matter of constitutional right; the venire need only be random, and a venire of thirty would have been acceptable in this case. But the district court's procedure promoted constitutional values that remain important after the minimum standard has been satisfied. The right to exercise peremptory challenges must be accommodated to conflict-

____, 106 S.Ct. 1712, 1724 (1986). Any holding that accords defendants an exaggerated entitlement to influence the selection of their jury and downplays the value to criminal justice of a minority presence on trial juries is regrettable.

III.

The selection among qualified potential jurors is an incident of trial in which the districdt court enjoys wide discretion. The defendant's right of peremptory challenge does not require a minimum venire, and the valid preference for a representative jury might lead the trial court toward a large panel of candidates. The majority today disregards these considerations and forsakes a fair process for the impositon of a more familiar one. Its dictate is not necessary, and its application here is not wise.

I would affirm the judgment of the district court.